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No. 99-798

In The

Supreme Court of the United States

PRISCILLA M. LIPPINCOTT ADAMS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

PRISCILLA M. LIPPINCOTT ADAMS has petitioned this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit denying her appeal from decisions of the United States Tax Court. The decisions below upheld a deficiency in income taxes, in addition to certain penalties, resulting from petitioner's exercise of her Quaker religious convictions against voluntarily paying for military activities and war preparation. In support of her petition, she gave two reasons why certiorari should be granted: (1) to enforce the language of the Religious Freedom Restoration Act and uphold the Congressional policy that federal government agencies must meet a statutory burden of proof under the "least restrictive means" test before unnecessarily burdening the exercise of sincere religious beliefs, and (2) to correct the lower courts' departure from this Court's settled precedent under the Free Exercise Clause.

Rather than address the reasons presented by the petitioner, the respondent claims that "[t]his case presents the same questions currently pending on petition for writ of certiorari in *Browne v. United States*, No. 99-632," Brief in Opposition ("BO") at 4, and then argues that the writ of certiorari should be denied "[f]or the reasons detailed in our brief in opposition in *Browne*. . . ." *Id.* But the instant case does not present both issues raised in that case. While the petitioners in *Browne* and the petitioner in this case have argued that the Internal Revenue Service's failure to abate various penalties violates both the Religious Freedom Restoration Act, 42 U.S.C.

§ 2000bb *et seq.* ("RFRA") as well as the First Amendment's Free Exercise Clause, the reasons that each petitioner gave for why a writ of certiorari should be granted, as well as factual and procedural differences in the cases, render much of the respondent's opposition in *Browne* inapplicable to this case. Moreover, the *Browne* petition does not advance all the same arguments for granting certiorari that are made in Ms. Adams' petition.

Apparently to enhance its position that the two cases can be addressed together, the respondent also restates the Questions Presented in the two cases in identical terms. The Questions stated in Ms. Adams' petition, however, are a carefully and accurately framed presentation of the issues that this Court might want to address in the case. The respondent's counterstatement is not only inapposite, but also entirely obscures the legal points presented. Significantly, Ms. Adams' petition does not challenge either "the imposition of federal income taxes" or of "interest." BO i. Her petition quite clearly and specifically *only* challenges the imposition of certain civil penalties, and not the tax system itself. For these reasons, the respondent's Brief in Opposition misses the mark.

In *Browne*, the respondent argues that the "decision of the court of appeals [in that case] is correct and does not conflict with any decision of this Court or any other court of appeals." *Browne* BO 5; see also *id.* 11-12 (discussing conflict claim made in *Browne* petition). Unlike the petitioners in *Browne*, however, the petitioner in this case has made no claim that the decision of the court of appeals in this case conflicts with the decision of any

other court of appeals.[1] While petitioner Adams has argued that the court of appeals' decision in her own case is incorrect and contrary to the decisions of this Court, her reasoning differed substantially from that of the petitioners in *Browne*, and the two appellate decisions have almost nothing in common (except that the Second Circuit's *Browne* decision cites and relies, in part, on the Third Circuit's opinion in petitioner Adams' case).

The respondent also argues in opposition to the *Browne* petition that the petitioners in that case "failed to establish reasonable cause for their failure to timely pay their taxes [because] [t]their complaint did not allege that they exercised ordinary business care, that they were unable to pay their taxes, or that undue financial hardship would result from timely paying the taxes in question." *Browne* BO 6. This argument is inapplicable to petitioner Adams' case for two reasons. First, petitioner Adams' case was decided after a trial on stipulated facts – not on the pleadings, as in *Browne*. Second, it is irrelevant in this case whether "undue financial hardship would result from timely paying the taxes in question," because the Internal Revenue Service did not assert late payment penalties in this case – even though the respondent inexplicably claims that such a penalty is "mandatory." *Browne* BO 5.

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[1] In addition, unlike the petitioners in *Browne*, the petitioner in this case advanced no claim either for interest abatement or for injunctive or declaratory relief. The respondent's argument in *Browne* that the district court had no jurisdiction over such claims, *Browne* BO 3 nn. 1 & 2, is therefore wholly inapplicable to the instant petitioner.

The respondent argues in *Browne* that the determination of the petitioners in that case not to pay federal income taxes did not have a "reasonable cause," because a "decision not to pay taxes that is based on a religious or other belief is not '[a] factor[ ] beyond the taxpayer's power to control.' " *Browne* BO 7 (bracketed insertions as in original). This argument is not persuasive – even with respect to penalties for failure to file tax returns or to pay estimated tax installments (which are at issue here). While factors which are not beyond a taxpayer's power to control may not constitute "reasonable cause" for a failure to file returns, the respondent's refusal to acknowledge how religious beliefs involve forces beyond the control or understanding of human beings is unsupported by case law, evidence, human experience, or logic. *Browne* BO at 7; see also cases cited and discussion in Ms. Adams' Petition, at 26 n.19; Amicus Brief of American Friends Service Comm., at 10 & n.5 (citing theological sources). Moreover, in the Tax Court in this case, the petitioner's unrebutted and unchallenged testimony, as stipulated by respondent and found to be fact by the Tax Court, was that her beliefs actually "precluded" her from filing on time. App. A38 (Stip. ¶ 46).

Next, the respondent argues in *Browne* that "the Free Exercise Clause does *not* require the United States to grant an exemption for religious hardship when, as here, waivers are granted on the basis of facially neutral, uniformly applicable standards that do not take into account religious or other beliefs." *Browne* BO 7 (emphasis original). For the reasons presented in the petition in this case, however, Congress' decision to grant exemptions to the failure to file penalty for "reasonable cause," App. A55,

and to the failure to pay estimated tax penalty for "unusual circumstances" which render its imposition "against equity and good conscience," App. A56, are precisely the individualized type of exemptions which this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), said may not exclude "religious hardship" without "compelling reason." *Id.* at 884. See Pet. 23-26.

Although the respondent's attorneys claim that exemptions are available "only upon the occurrence of specific circumstances beyond the individual's control," *Browne* BO 8, the respondent's own longstanding Policy Statement contradicts that claim. The Internal Revenue Manual provides that:

> Any sound reason advanced by the taxpayer as the cause for delay in filing a return . . . will be carefully analyzed to determine whether the applicable penalty should be asserted.

IRM 1218, IRS Policy P-2-7 (App. A57). The respondent's attorneys make no attempt to reconcile the respondent's own published policy and interpretation of the statute with their unsupported contrary assertion. The Policy Statement goes on, for instance, to list as "examples of sound causes" a "death or serious illness" in the taxpayer's immediate family. *Id.* The taxpayer's *own* death or illness might make compliance impossible, but a taxpayer's attention to a *relative's* death or illness only reflects a matter of making a pressing but voluntary decision among priorities. The respondent's claim that religious exercise involves only free choice and that voluntary choices never constitute "reasonable cause" is belied by examples such as this. The respondent's argument would simply justify the kind of discriminatory

exclusion of religious reasons that RFRA and the Free Exercise Clause prohibit.

Finally, the respondent argues in *Browne* that because pre-*Smith* cases uniformly rejected Free Exercise claims in tax cases, that the court of appeals was correct to reject the petitioner's RFRA claim. *Browne* BO 9-10. While the legislative history of RFRA suggests that courts may sometimes look to pre-*Smith* precedent for guidance, the respondent's reference to cases which fail to follow the procedures and standards mandated by RFRA can provide no guidance at all. See *Browne* BO 10-11.[2]

As this Court acknowledged in *Smith*, such decisions as *United States v. Lee*, 455 U.S. 252 (1982), only "purported" to apply the *Sherbert* test. 494 U.S. at 883.[3] If

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[2] The respondent claims, in particular, that these cases demonstrate a settled body of precedent rejecting Free Exercise challenges to the imposition of tax penalties. *Browne* BO 11. In fact, none of these cases raised any of the issues presented by our petition. Only one (*Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986), mis-cited by the respondent) even discusses the statutory basis for abatement of penalties. And *Nelson* is a "frivolous return" case under 26 U.S.C. § 6702, which does not have a "reasonable cause" or "exceptional circumstances" exemption.

[3] The other cases cited by the respondent fare no better. *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), provides no guidance in RFRA cases, because it also did not require the government to *demonstrate* with evidence the truth of its assertion that the tax system could not survive recognition of religious exceptions. None of the pre-*Smith* cases cited by respondent as approving the imposition of penalties for failing to comply with the tax laws for religious reasons even "purports" to apply a *Sherbert*-type analysis to a claimed exemption from penalties imposed for failure to file or pay taxes (including estimated taxes). *Browne* BO 11.

courts are permitted under RFRA to follow decisions which only "purport" to apply the *Sherbert* test, but which in fact do not, then only lip-service will be paid to the accommodations to free religious exercise which Congress has mandated. Only pre-*Smith* cases which apply *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) – the cases specifically referenced in 42 U.S.C. § 2000bb(b)(1) – according to their terms and their spirit can properly provide guidance in decisions under RFRA. Moreover, RFRA assigns a specific burden of proof by "evidence," *id.* § 2000bb-2(3) – an enhancement to the *Sherbert* test, as Judge Noonan has pointed out. See *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996); Amicus Brief for Philadelphia Yearly Meeting of Religious Society of Friends, at 14-15. By relying exclusively on the *Browne* opposition, the respondent ignores the failure of the IRS to offer any evidence at trial in this case to support its purely rhetorical contention that no accommodation is feasible.

This Court should grant certiorari to enforce the application of RFRA to all federal agencies, including the Internal Revenue Service, according to its terms, as well as to contrast that strong statutory rule with the narrower, post-*Smith* equal-consideration Free Exercise test, based on *Sherbert*.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the Petition, PRISCILLA M. LIPPINCOTT ADAMS prays that this Court grant her petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

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